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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1310

CLABER DISTRIBUTING COMPANY,
Appellant,

vs.

RUBBERMAID, INC.,
Appellee.

JURISDICTIONAL STATEMENT

On Appeal from the Supreme Court of the State of Ohio.

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TABLE OF CONTENTS.

Jurisdictional Statement	1
Opinion Below	1
Jurisdiction	2
Questions Presented	4
Statement	6
Questions Presented Are Substantial	11
(1) Unconstitutionality of Statute Permitting Recovery of Attorney Fees	11
(2) Whether the Conduct of a Manufacturer Granting Favorable Prices and Promotional Allowances on a Discriminatory Basis to Its Customers Constitutes an Illegal Act of Unfair Competition, Such as to Bar Injunctive Relief Against Claber	13
The Questions Are Substantial	14
Conclusion	19
Appendix	Separately Printed

TABLE OF AUTHORITIES.

Cases.

Bantam Books, Inc., v. Sullivan, 372 U. S. 58, 83 S. Ct. 631 (1963) ---- 3

Charleston Federal Sav. & Loan Assn. v. Alderson, 324 U. S. 182, 65 S. Ct. 624 (1945) ---- 3

Coal Co. v. Rosser, 53 Ohio St. 12, 41 N. E. 263 ---- 17

Federal Trade Commission v. Fred Meyer, Inc., -- S. Ct. --, 36 LW 4233 ---- 19

Fiske v. State of Kansas, 274 U. S. 380, 47 S. Ct. 655 (1927) ---- 3

Gulf C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 17 S. Ct. 255 (1897) ---- 17

Hudson Dists., Inc. v. Eli Lilly & Co., 1963 CCH Trade Cas. ¶ 70,871 (Ohio C. P. 1963) ---- 14

Kansas City Southern Ry. Co. v. Road Improvement Dist., No. 3, of Sevier Cty, Arkansas, 266 U. S. 379, 45 S. Ct. 136 (1924) ---- 3

Missouri Pacific Ry. v. Tucker, 230 U. S. 340, 33 S. Ct. 961 (1913) ---- 17

Newman v. Piggie Park Enterprises, -- S. Ct. --, 36 LW 4243 ---- 18

Olin Mathieson Chemical Corp. v. The Ontario Store of Price Hill, Ohio, 9 Ohio St. 2d 67, 223 N. E. 2d 592 ---- 15

Olin Mathieson Chemical Corp., Winchester Western Div., v. The Ontario Store of Toledo, Ohio, Vol. XL, Ohio Bar No. 11, p. 570 ---- 15

People of State of Ill., ex rel. McCollum v. Bd. of Ed. School Dist. No. 71, Champaign Cty., Ill., 333 U. S. 203, 68 S. Ct. 461 (1948) ---- 3

Tumey v. Ohio, 273 U. S. 519, 47 S. Ct. 437 (1927) 3

Western Turf Assn. v. Greenberg, 204 U. S. 359, 27 S. Ct. 384 (1907) 3

Constitution and Statutes.

Constitution of the United States, Fourteenth Amendment 4, 17

Ohio Fair Trade Act of 1959 (Ohio Revised Code Sections 1333.27 *et seq.*) 2, 3, 4, 5, 8, 9, 15

Sec. 1333.24 *et seq.* 6

Sec. 1333.32 9, 10

Sec. 1333.32(A) 4, 5, 7

Sec. 1333.32(B) 3, 4, 11, 16, 17

Robinson-Patman Act, 15 U. S. C. 13(a), (d), (e), (f) 18-19

28 U. S. C. 1257(2) 2

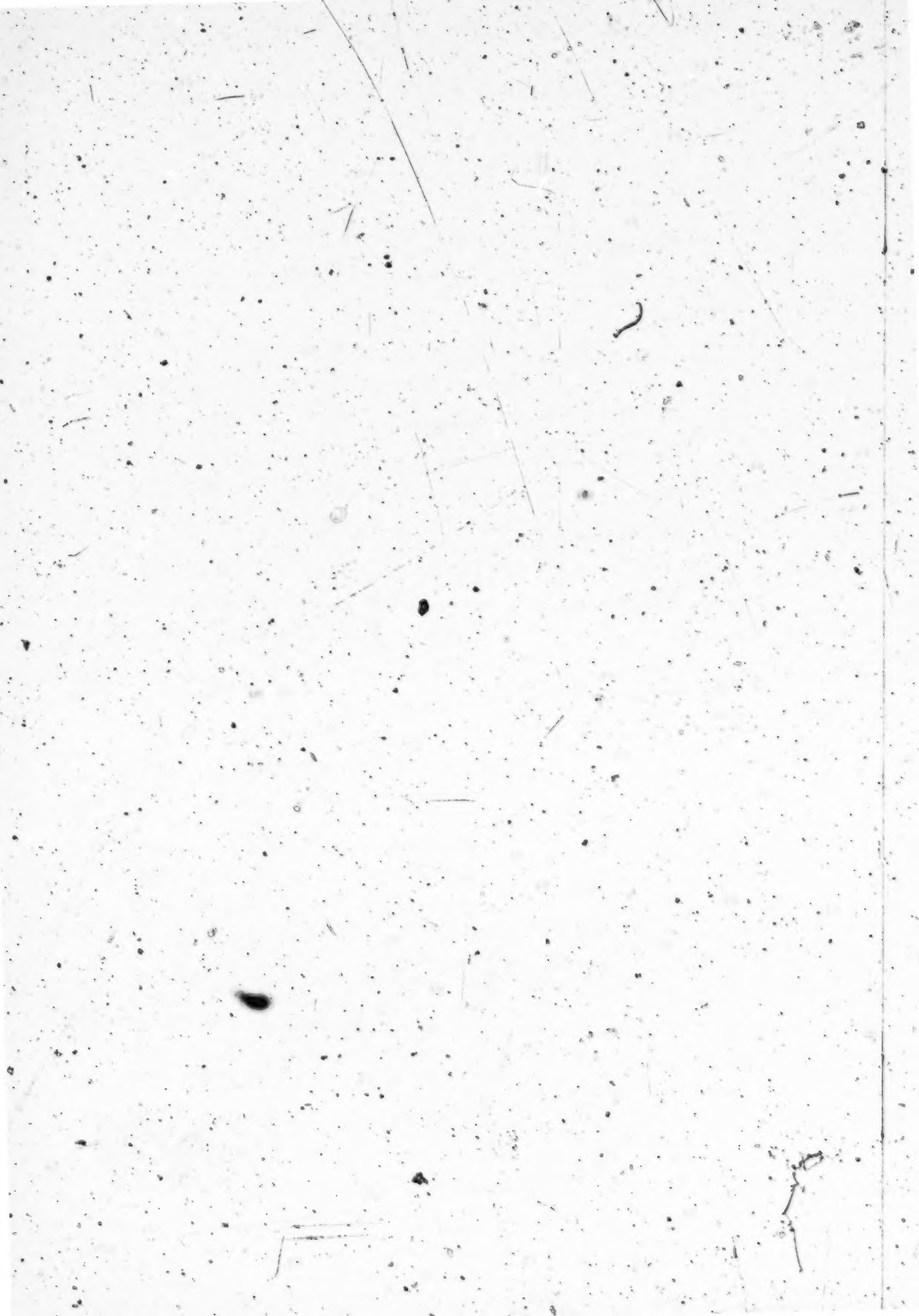
42 U. S. C. 2000a-3(b) 18

Other.

2 CCH Trade Reg. Rep. ¶ 6368 (1965) 14

Gorrell & Brown, "A re-examination of fair trade legislation in the context of the new Ohio Fair Trade Act and the decision in *Hudson Dists., Inc. v. Upjohn Co.*" 15 W. Res. L. Rev. 84 (1963) 16

14 O. Jur. 2d *Costs*, § 35, page 32 17



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JURISDICTIONAL STATEMENT.

Appellee, Rubbermaid, commenced this action in 1963 under the so-called Ohio "Fair Trade" Act of 1959 to obtain injunctive relief and damages, including attorney fees, from Appellant, Claber, a non-signator of a "fair trade" contract, for the alleged failure to maintain Rubbermaid's fixed resale prices.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the trial court, the Common Pleas Court of Cuyahoga County, Ohio, of March 5, 1965, granting a conditional injunction, is reported officially in 3 Ohio Misc. 39, unofficially at 205 N. E. 2d 41, and is printed in the Appendix hereto at page 5a. A supplemental opinion of the trial court of May 12, 1965, dismissing Rubbermaid's application for an order directing

Claber to pay reasonable attorney fees is not reported and is printed in the Appendix hereto at page 29a. A further oral opinion of the trial court of July 22, 1965, cancelling the conditional injunction and denying Rubbermaid's prayer is not reported and is printed in the Appendix at page 37a. The Memorandum Opinion of the Court of Appeals for the Eighth Judicial District of Ohio, Cuyahoga County, granting an injunction and allowing attorney fees, is unreported and is printed in the Appendix hereto at page 41a. The Supreme Court of Ohio did not write an opinion.

JURISDICTION.

This action was commenced in 1963 by Rubbermaid under the so-called Ohio "Fair Trade" Act of 1959, §§ 1333.27 through 1333.34, of the Ohio Revised Code, 128 Ohio Laws 696 through 702, to obtain injunctive relief and damages, including attorney fees, from appellant, Claber, a non-signator of a "fair trade" contract, for Claber's alleged failure to maintain Rubbermaid's fixed resale prices.

The judgment of the Supreme Court of Ohio was entered November 1, 1967, dismissing an appeal as of right and overruling a motion to certify the record. A motion for rehearing, timely filed, was denied on November 29, 1967. Notice of appeal was filed with the Supreme Court of Ohio on February 26, 1968. The time within which this case might be docketed with the Supreme Court of the United States was extended, upon application timely filed, to and including April 12, 1968.

Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, § 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judg-

ment on direct appeal in this case: *Bantam Books, Inc., v. Sullivan*, 372 U. S. 58, 83 S. Ct. 631 (1963); *People of State of Ill., ex rel. McCollum v. Bd. of Ed. School Dist. No. 71, Champaign Cty., Ill.*, 333 U. S. 203, 68 S. Ct. 461 (1948); *Charleston Federal Sav. & Loan Assn. v. Alderson*, 324 U. S. 182, 65 S. Ct. 624 (1945); *Fiske v. State of Kansas*, 274 U. S. 380, 47 S. Ct. 655 (1927); *Tumey v. Ohio*, 273 U. S. 519, 47 S. Ct. 437 (1927); *Kansas City Southern Ry. Co. v. Road Improvement Dist., No. 3, of Sevier Cty., Arkansas*, 266 U. S. 379, 45 S. Ct. 136 (1924); *Western Turf Assn. v. Greenberg*, 204 U. S. 359, 27 S. Ct. 384 (1907).

The statute, the validity of which is challenged herein, is § 1333.32(B) of the Ohio Revised Code, 128 Ohio Laws 698 (701), which provides:

> "Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to:
>
> (1) Recover the amount of damages sustained as a result thereof;
>
> (2) Obtain injunctive relief whether or not specific monetary damages are established;
>
> (3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established."

This provision is part of the so-called Ohio "Fair Trade" Act, §§ 1333.27 through 1333.34, of the Ohio Revised Code, which is reproduced in its entirety in the Appendix hereto at page 52a.

QUESTIONS PRESENTED.

1. Is § 1333.32(B) of the Ohio Revised Code, to the extent that it purports to authorize an award of attorney fees to a successful plaintiff only, an unreasonable denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment of the United States Constitution?

2. Does the conduct of a proprietor which engages in a course of business whereby concessions in the form of favorable prices and demonstrator and advertising allowances are made available only to a certain arbitrarily limited class of direct buying retailers, including its largest Ohio retailer, and excluding Claber, constitute an illegal act of unfair competition, such as to bar injunctive relief against Claber, a non-signer retailer?

3. Where, on an appeal on questions of law only, a reviewing court reverses a trial court's denial of discretionary injunctive relief and attorney fees in an action pursuant to § 1333.27, et seq., of the Ohio Revised Code, absent a finding of a plain abuse of discretion, with such reversal based solely upon "prejudicial error," has there been a denial of due process and the equal protection of law as guaranteed by the Fourteenth Amendment of the United States Constitution?

4. Does the giving of trading stamps, having a value of 4.34% of the sales price, in connection with the sale of articles subject to a resale price maintenance program in accordance with §§ 1333.27, et seq., of the Ohio Revised Code, exceed the 3% limitation contained in § 1333.32(A) and, thus, constitute an act of unfair competition sufficient to bar injunctive relief?

5. Where a proprietor has knowingly acquiesced in and consented to the practice of its largest Ohio retailer

(with which it has a signed "fair trade" contract) in the giving of trading stamps in excess of the 3% limitation of § 1333.32(A), of the Ohio Revised Code, is such conduct indicative of a lack of diligence and good faith in enforcement, constituting an abandonment of its fair trade policy, sufficient to bar injunctive relief against a non-signer retailer alleged to have made sales below the proprietor's stipulated minimum resale prices?

6. Does a proprietor which has established a minimum resale price maintenance policy indicate a lack of good faith and diligence, constituting an abandonment of its fair trade policy, sufficient to bar injunctive relief against a non-signer retailer, when it unilaterally, temporarily and substantially varies its so-called "fair trade" prices from time to time, during certain periods designated "special promotions"?

7. Does a proprietor who maintains a minimum resale price maintenance program pursuant to § 1333.27, et seq., of the Ohio Revised Code, and who undertakes to market some products as "promotional items" under the same trade name and trade mark utilized in connection with fair trade items, at lower prices than under its fair trade program, which products are virtually identical with those "fair traded" at substantially higher prices, thus indicate a lack of diligence and good faith in its resale price maintenance program, constituting an abandonment thereof, sufficient to bar injunctive relief against a non-signing retailer?

STATEMENT.

Appellant, Claber, owns and operates several large, modern, self-service retail stores in and around Cuyahoga County (Cleveland), Ohio. These stores offer a very full line of merchandise in attractive surroundings, primarily at outlying suburban locations. This firm is typical of retail operations which have developed over the past decade and a half which sell merchandise, utilizing self-service, cash and carry sales only, at locations outside high rent districts. Savings incurred as a result of the method of operation are passed along to the consumer through lower mark-ups and, consequently, lower prices.

Appellee, Rubbermaid, manufactures and distributes a quality line of plastic and rubber housewares. Its products are extensively nationally advertised and in demand by consumers. It has long been Rubbermaid's policy to "fair trade" its houseware products where permitted. In those states where possible, Rubbermaid requires an executed agreement with a retailer to maintain minimum resale prices.

In Ohio, pursuant to § 1333.24, et seq., of the Ohio Revised Code, in addition to signed "fair trade" contracts, a retailer is deemed bound upon receipt of notice from a manufacturer of a minimum stipulated resale price, even in the absence of a contractual relationship. Mere acquisition of merchandise with notice of the minimum resale prices stipulated by the manufacturer is deemed conclusive evidence of actual notice. Pursuant to said sections, it is made unlawful and an act of unfair competition for any retailer with such notice of minimum resale prices to sell such commodity at less than stipulated minimum resale price.

Claber declined to enter into an agreement with Rubbermaid to maintain minimum resale prices. Thereafter,

Claber sought, acquired when it was able (despite Rubbermaid's efforts to cut-off Claber's sources of supply), and sold Rubbermaid products at retail prices below the fixed minimum resale prices unilaterally established by Rubbermaid, in conformity with its uniform merchandising policies. Rubbermaid commenced this action to obtain injunctive relief and damages, including attorney fees, from Claber for the alleged failure to maintain such fixed minimum resale prices.

At the trial level, Claber alleged and established that, with Rubbermaid's *knowledge, consent, acquiescence* and *participation,* the May Company (Rubbermaid's largest Ohio retailer) had continually violated its *signed* minimum resale price maintenance contract as well as § 1333.32(A), of the Ohio Revised Code, by giving concessions in the form of double trading stamps on Tuesdays having a value of 4.34% of the sale price, *well in excess of the 3% limit set forth in §1333.32(A).* This limited exception was specifically inserted by the Ohio General Assembly to make possible the giving of some trading stamps, but only in a specifically limited amount, to-wit:

> "* * * provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed 3% of such stipulated resale price * * *."

Reference to this provision's legislative history puts to rest any dispute as to the legislature's intention. Moreover, Rubbermaid itself unequivocally interpreted the limitation contained in the statute by spelling out the precise procedure in its written contract with the May Company.

Claber also alleged Rubbermaid's abandonment of its minimum resale price maintenance program with respect to certain promotional items (ostensibly outside the "fair

trade" program) and that Rubbermaid itself varied its minimum resale prices, from time to time, by approximately one-third during periods of so-called "special promotions."

It also developed during the course of the trial that the May Company and Rubbermaid enjoyed a mutually advantageous relationship; that the May Company is Rubbermaid's largest Ohio retailer; that it is one of a few of Rubbermaid's favored customers permitted to purchase directly from Rubbermaid, avoiding jobbers, with concomitant financial benefits; that the May Company receives substantial promotional allowances and credits not available to most other Rubbermaid retailers; that as one of those benefits, the May Company has full time employees called "Rubbermaid demonstrators" on its sales staff. These people are either on Rubbermaid's payroll or the May Company receives 100% reimbursement for all payroll costs from Rubbermaid. While ostensibly these individuals' primary duty is the promotion and sale of Rubbermaid products, in practice they are indistinguishable from all other May Company sales personnel. They sell other products as well as Rubbermaid and significantly participate in May Company's practice of giving double trading stamps for cash purchases of all products on Tuesdays, including those which are "fair traded." It is this practice that the trial court found *inconsistent* with the resale price maintenance program pursuant to § 1333.27, et seq., of the Ohio Revised Code

On the state of the record, the trial concluded that Rubbermaid had, in fact, *knowingly permitted, acquiesced and participated* in the May Company's violation.

At the conclusion of the trial, the court sustained Claber's defenses in part and initially granted Rubber-

maid a conditional injunction to take effect on a future stated date, unless, at further hearings to be held, it was determined that Rubbermaid's "consent or acquiescence" with respect to the practice of the May Company Department Stores in Cuyahoga County, in violation of § 1333.27, et seq., of the Ohio Revised Code, and the signed Rubbermaid retail price maintenance contract, had not ceased. The question of damages, including attorney fees, was reserved for further consideration of the court by stipulation of the parties.

Thereafter, Rubbermaid applied for an order requiring Claber to pay attorney fees of its counsel in this litigation, having relinquished its claim of damages. The trial court upheld the validity of the statute, allowing the recovery of attorney fees, but held that it was a matter that should be governed by the exercise of sound judicial discretion. Further, the court stated that in the exercise of such discretion, based upon Claber's good faith in defense of the action, it would dismiss the application for attorney fees.

Subsequently, hearings were held pursuant to the court's original order allowing a conditional injunction, at the conclusion of which the court found that the conditions of *consent* and *acquiescence* in the violation by Rubbermaid's largest Ohio retailer, the May Company, persisted and the court entered an order denying Rubbermaid any injunctive relief.

Thereafter, Rubbermaid appealed on questions of law only on a very skeleton bill of exceptions, to the Court of Appeals for the Eighth Judicial District of Ohio, Cuyahoga County, on the issue of whether the giving of double trading stamps in an amount in excess of the limit set forth in § 1333.32, Ohio Revised Code, constitutes a violation of

the 1959 "Ohio Fair Traded-Minimum Resale Price Act" and also from the trial court's refusal to award attorney fees.

The Court of Appeals found "error prejudicial to the plaintiff," holding that the violation of the "fair trade" Act by one retailer should not have been considered by the trial court as a bar to injunctive relief; that the giving of double trading stamps in the amount of 4.34% in excess of the 3% limit of § 1333.32 was not a violation of the Ohio "Fair Trade" Act; that Rubbermaid had exercised reasonable diligence in enforcing its "fair trade" program and was thus entitled to injunctive relief.

The Court of Appeals remanded the case to the trial court with instructions to grant an injunction as prayed for and "to determine a reasonable amount of attorneys fees to which plaintiff is entitled."

It is significant to note that in arriving at this conclusion, the Court of Appeals failed to find an *abuse of discretion*. Instead, it found only error prejudicial to the plaintiff, in an appeal on questions of law only. It was urged in the Court of Appeals and in the Supreme Court of Ohio that "abuse of discretion" and "prejudicial error" are separate and distinct principles; and that the latter is not a sufficient basis upon which to reverse a trial court's denial of discretionary injunctive relief, and denial of discretionary attorney fees. The Court of Appeals, on an appeal on questions of law only, did not even have an opportunity to consider the trial record *de novo* in order that it might determine whether or not the trial court abused its discretion. This is of particular significance with respect to the Court of Appeals' decision pertaining to the award of attorney fees. Nowhere in the Memorandum to Lawyers (the Court of Appeals' opinion) is the subject of attorney fees even discussed except in the

final phrases which remanded the case to the Common Pleas Court with instructions to determine a reasonable amount of attorney fees to which the appellate court found Rubbermaid entitled.

The Supreme Court of Ohio dismissed an appeal as of right and overruled a motion to certify the record, as well as a motion for rehearing. Notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Ohio.

QUESTIONS PRESENTED ARE SUBSTANTIAL.

(1) Unconstitutionality of Statute Permitting Recovery of Attorney Fees.

Validity of § 1333.32(B) of the Ohio Revised Code was injected into this case by Rubbermaid's application in the trial court for recovery of costs of suit, including reasonable attorney fees. Claber directly challenged the constitutionality of said section in its motion to dismiss the application and its brief in support thereof wherein it stated that said section is unconstitutional in that it denied Claber due process and equal protection of the law. The trial court, in its opinion of May 12, 1965 (Appendix 29a) upheld the constitutionality of said section, but did determine that the statute vested discretionary authority in the trial court to award attorney fees and determined to exercise that discretion and deny attorney fees to Rubbermaid on the basis of Claber's good faith defense of the litigation.

Rubbermaid had requested, in its application, attorney fees in the amount of Twenty One Thousand Six Hundred Dollars ($21,600.00). Subsequently, they filed a supplemental application in the Court of Appeals for additional attorney fees in the amount of Thirteen Thou-

sand Five Hundred Forty Four Dollars and Thirty Eight Cents ($13,544.38).

The constitutionality of said section was in issue before the Court of Appeals by reason of Rubbermaid's assignment of error No. 2, "The trial court erred in holding that the plaintiff was not entitled to recover statutory attorney fees," and Claber's position set forth in its brief in the Court of Appeals contending that said section is unconstitutional as a denial of due process and the equal protection of the law. The Court of Appeals, in its Memorandum to Lawyers dated April 25, 1967, containing its decision, unfortunately, ignored the attorney fee issue in its entirety, except to find that in addition to injunctive relief, Rubbermaid was entitled to recover its reasonable attorney fees.

The issue was before the Supreme Court of Ohio by Item VIII in the Statement of Questions of Law Involved and Contentions of the Appellant, to-wit:

> "VIII. Section 1333.32(B), of the Ohio Revised Code, to the extent that it purports to authorize an award of attorney fees only to a successful plaintiff, is an unreasonable denial of the equal protection of the law and is thus unconstitutional and void."

The Supreme Court of Ohio disposed of this question by dismissing the appeal as of right on the basis that no substantial constitutional question was involved.

(2) Whether the Conduct of a Manufacturer Granting Favorable Prices and Promotional Allowances on a Discriminatory Basis to Its Customers Constitutes an Illegal Act of Unfair Competition, Such as to Bar Injunctive Relief Against Claber.

This issue was raised initially by virtue of Claber's Fourth Defense in its Answer to Rubbermaid's Amended Petition filed in the trial court. Said defense provided:

> "During all times herein concerned, plaintiff [Rubbermaid] has had in effect a system of pricing its "Rubbermaid" products for sale to retailers whereby certain retailers and classes of retailers have received discriminatory advantages by way of additional discounts, demonstrator allowances and advertising allowances; said practice by the plaintiff being entirely inconsistent and in conflict with its alleged program of resale price maintenance."

The trial court noted in its opinion of March 5, 1965 (Appendix 25a) that:

> "* * * it is claimed discriminatory price discounts by way of demonstrator and advertising allowances favor certain retailers and classes of retailers."

The court found (Appendix 26a) that Rubbermaid sold direct to "department stores," but that by Rubbermaid's vague definition of the term, Claber and establishments similar to it were excluded, although they met all other criteria.

Further, the court found that Rubbermaid's direct purchasers which utilized the demonstrator allowance in effect purchased merchandise at 40% and 18% off list, which produced a substantially lower price than the 40% and 5% off list price available to non-direct purchasing

retailers. Upon consideration, the court found (Appendix 27a) that the demonstrator allowances were not "deliberately discriminatory nor intentionally harmful to the defendant." Likewise, the court found the 3% cooperative merchandising allowance available only to direct purchasing department stores non-discriminatory. Despite these conclusions contrary to Claber's assertions, the court ultimately denied Rubbermaid any injunctive relief.

THE QUESTIONS ARE SUBSTANTIAL.

1. The Ohio statute is the only fair trade act in this country which allows attorney fees as well as damages. 2 CCH Trade Reg. Rep. ¶ 6368 (1965). Attorney fees are allowable only to an enforcer and are allowed independent of proof of damages. The instant action represents but the second occasion of an award of attorney fees under this statute. To date the fees claimed are Twenty One Thousand Six Hundred Dollars ($21,600.00) in connection with the trial court litigation plus approximately Thirteen Thousand Five Hundred Dollars ($13,500.00) in addition in connection with the appellate litigation. In the only other known instance in Ohio of an award of attorney fees under this section, the award was Thirty Eight Thousand One Hundred Dollars ($38,100.00) in *Hudson Dists., Inc. v. Eli Lilly & Co.*, 1963 CCH Trade Cas. ¶ 70,871 (Ohio C. P. 1963).[1]

The uniqueness of Ohio's statute and the rarity with which the provision for the award of attorney fees has been utilized is deceiving as not until April 26, 1967

[1] This award was subsequently vacated and the case assigned for retrial when the direct interest of the trial judge in a non-discounting retail store located near the alleged violator's sister's store became known.

did the Supreme Court of Ohio have occasion to consider and decide several cases involving the constitutionality of the Ohio "Fair Trade" Act, §§ 1333.27, et seq., of the Ohio Revised Code. *Olin Mathieson Chemical Corp. v. The Ontario Store of Price Hill, Ohio,* 9 Ohio St. 2d 67, 223 N. E. 2d 592, and *Olin Mathieson Chemical Corp., Winchester Western Div., v. The Ontario Store of Toledo, Ohio,* Vol. XL, Ohio Bar No. 11, p. 570. Those decisions injected new life into numerous fair trade cases which were languishing on the dockets of various trial courts throughout the State of Ohio. In addition, they opened the flood gates to the filing of large numbers of new cases. For instance, in October of 1967, at least fourteen new fair trade cases were filed in the United States District Court for the Northern District of Ohio, in Cleveland. In this context, the question as to the validity of the section allowing an enforcer to recover attorney fees (which was not an issue in those cases) as against a constitutional challenge of denial of due process and the equal protection of the law, becomes a vital concern not only to all retailers within the State of Ohio but to the state courts and the federal courts sitting in Ohio as well.

As a result of such a provision, a retailer, who undertakes to defend a "fair trade" action, does so at his peril. Not only must he consider the expense of his own defense, but also the fact that he will have to pay the manufacturer's legal fees in the event he is unsuccessful. That such a result was the intent of the sponsors of the legislation is indicative from the statement of one of the authors of the bill after the first award of attorney fees made in a "fair trade" case:

> "Counsel throughout the state of Ohio would do well to bear this [award of $38,100 in attorney fees] in

mind when advising clients on the merits of contesting actions commenced under the new fair trade act." [2]

It must be noted that the provision of the 1959 "fair trade" Act which permits allowance of attorney fees only to a successful plaintiff does so independently of a claim or proof of damages, and not as an element of damages. The statute purports to permit the allowance of attorney fees to the plaintiff as part of the costs of suit, even though, as here, monetary damages have not been established and are not now involved.[3]

Such a provision for the allowance of attorney fees may not be treated as a penalty because the Act does not undertake to provide for a penalty. The Act merely undertakes to establish, albeit by construction and fiction, contract rights between the plaintiff, the producer, and the defendant who may be sued. The Act then permits an action to be filed (1) for damages and/or (2) injunctive relief and (3) costs of suit, including reasonable attorney fees.

Anticipating the defect in allowing attorney fees separate and apart from any monetary damages, this tailor-made Act undertakes to pull itself up by reciting that the

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[2] Gorrell & Brown, "A re-examination of fair trade legislation in the context of the new Ohio Fair Trade Act and the decision in *Hudson Dists., Inc. v. Upjohn Co.*" 15 W. Res. L. Rev. 84 (1963) at 99.

[3] Ostensibly § 1333.32 (B) contains language to the effect that "any person" may bring suit. This, however, does not change the clear meaning, inasmuch as "any person" in the context of the statute is limited to a person suffering or anticipating damage by reason of violation of the section, which must be a "proprietor," i.e., one who establishes minimum resale prices for a commodity. As a result, only a successful plaintiff can recover attorney fees and a plaintiff can only be from a limited class of litigants composed of manufacturers and producers of trade marked products.

costs and attorney fees may be recovered whether or not specific monetary damages are established. Significantly, statutes providing for the taxation of attorney fees as costs have been held unconstitutional as class legislation, on the ground that the fees were taxable in favor of or against only one of the parties to the action. 14 O. Jur. 2d *Costs*, § 35, page 32.

In *Gulf C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 S. Ct. 255 (1897), an Act providing that railway companies failing to pay claims for less than Fifty Dollars ($50.00) within thirty days of presentation thereof, shall be liable for attorney fees not exceeding Ten Dollars ($10.00), was held void as depriving such companies of the equal protection of the law.

So, too, in *Missouri Pacific Ry. v. Tucker*, 230 U. S. 340, 33 S. Ct. 961 (1913) wherein it was held that a Kansas statute imposing a liability of Five Hundred Dollars ($500.00) as liquidated damages together with reasonable attorney fees for every charge by a common carrier in excess of specified rates, takes property without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution.

In Ohio, a statute which allowed a fee not in excess of Five Dollars ($5.00) for plaintiff's attorney in an action for wages was held unconstitutional and void in *Coal Co. v. Rosser*, 53 Ohio St. 12, 41 N. E. 263.

In the context of § 1333.32(B) the special favored class of litigants is the producer or manufacturer who establishes a minimum resale price for his products. Similarly, under said section, the special class of litigants which is penalized is retailers. In the vast majority of "fair trade" cases, retailers find themselves pitched against large national corporations of unlimited resources. They

must thus not only contemplate financing their own defense, but also hazard the risk of paying the manufacturer's expenses too. As a result, they clearly defend at their peril, and are discouraged from defending such suits.

It is noteworthy that the Ohio statute in question is unlike that most recently before this Court (42 U. S. C. § 2000a-3(b)) in *Newman v. Piggie Park Enterprises*, __ S. Ct. __, 36 LW 4243, which provides that the "prevailing party" may be entitled to reasonable attorney fees.

2. As an affirmative defense in its Answer to Rubbermaid's Amended Petition before the trial court, Claber alleged that:

> "During all the times herein concerned, plaintiff has had in effect a system of pricing its 'Rubbermaid' products for sale to retailers whereby certain retailers and classes of retailers have received discriminatory advantages by way of additional discounts, demonstrator allowances and advertising allowances; said practice by the plaintiff being entirely inconsistent and in conflict with its alleged program of resale price maintenance."

Prior to denying Rubbermaid any injunctive relief, the trial court in its opinion of March 5, 1965 (Appendix 26a) found that Rubbermaid sold direct to certain classes of retail dealers which included its largest Ohio retailer, but excluded Claber, although it met other criteria, at advantageous prices, and allowed them concessions by way of demonstrator allowances and advertising allowances which were not available to non-direct purchasing retailers. Although finding these allegations to be true, the trial court nevertheless found the demonstrator allowances not to be deliberately discriminatory nor intentionally harmful to defendant. In so doing, the trial court overlooked the provisions of the Robinson-Patman Act, 15

U. S. C. 13(a), (d), (e), (f). In *Federal Trade Commission v. Fred Meyer, Inc.*, __ S. Ct. __, 36 LW 4233, this court unequivocally held that a supplier may make a payment to retailer for services and allowances *only* if such payments are made available to all competing retailers handling the supplier's products. Claber's allegation of such discriminatory violation as is recognized in *Fred Meyer* was ignored by the trial court and is of extremely vital concern to all retailers. Such a violation if found by the trial court would have been a sufficient bar to injunctive relief against Claber.

CONCLUSION.

Appellant submits that the questions submitted by this appeal are substantial and that they are of vital public importance. We believe that the Supreme Court of Ohio's decision is not consistent with the previous pronouncement of this Court and other authorities.

Respectfully submitted,

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